88-2070

CASE NUMBER:

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

1988 TERM

UNITED STATES OF AMERICA
Respondent

VS.

DANIEL LEO BROCKI
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Daniel Brocki, Esq.
For Himself

3500 Culpepper Drive
Erie PA 16506
(814) 833-4381

56 pp

A. QUESTIONS PRESENTED FOR REVIEW.

1. DID THE DISTRICT COURT DEPRIVE MR. BROCKI OF DUE PROCESS BY SUSPENDING HIM FROM LAW PRACTICE UNDER AN "UNFITNESS" RULE APPLIED AFTER THE FACT AND WITHOUT UNDERPINNINGS TO CURE ITS UNCONSTITUTIONAL VAGUENESS?

2. DID THE LOWER FEDERAL COURTS ERR IN FINDING THAT THE "UNFITNESS" TEST EVEN HAS ANY APPLICABILITY TO MR. BROCKI AT ALL?

3. DID THE LOWER FEDERAL COURTS ERR IN FINDING ANY "UNFITNESS" OF MR. BROCKI AS A MATTER OF FACT?

4. SHOULD THE SUSPENSION OF MR. BROCKI FROM PRACTICING LAW BE REVERSED RETROACTIVE TO THE TIME OF IMPOSITION?

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Office of Disciplinary Counsel v. Keller, 509 Pa. 573, 506 A.2d 872 (1986)..... ADD

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Office of Disciplinary Counsel v. Lewis, 493 Pa. 519, 426 A.2d 1138 (1981)..... ADD

Office of Disciplinary Counsel v. Lucarini, 504 Pa. 271, 472 A.2d 186 (1983)..... ADD

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D. LIST OF PARTIES TO THE PROCEEDING.

Appellee in the Court of Appeals and Respondent in this action is the United States District Court for the Western District of Pennsylvania ("District Court"). There are no other parties besides Petitioner and the District Court.

E. REPORTS OF OPINIONS BELOW.

To the knowledge of Petitioner the opinion and orders below have not been published.

F. JURISDICTIONAL GROUNDS.

The Judgement Order of the Court of Appeals for the Third Circuit sought to be reviewed is dated April 17, 1989. This Judgement Order affirmed an Order of the District Court dated November 25, 1988 which imposed the suspension from practice before the District Court.

Both the Court of Appeals and District Court Orders were entered on their dates.

Review on writ of certiorari is believed to be conferred on the United States Supreme Court by 28 U.S.C.A. Sec.1254(1) when the suspension appealed from is pursuant to a federal court rule as set forth below.

G. CONSTITUTIONAL AND REGULATORY AUTHORITIES INVOLVED.

U.S. Constitution, Amendments V and XIV.

^^^^^^^^^^

U.S. Dist. Ct. West. Dist. Pa., Local Rule 22 I A:

> The United States District Court for the Western District of Pennsylvania, in furtherance of its inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it, or admitted for the purpose of a particular proceeding (pro hac vice), promulgates the following Rules of Disciplinary Enforcement superseding all of its rules pertaining to disciplinary enforcement heretofore promulgated.

^^^^^^^^^^

U.S. Dist. Ct. West. Dist. Pa., Local Rule 22 I B:

> Acts or omissions by an attorney admitted to practice before this court, individually or in concert with others, which violate the Rules of Professional Conduct adopted by this court shall constitute misconduct and

shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Rules of Professional Conduct adopted by this court are the Rules of Professional Conduct adopted by the Supreme Court of Pennsylvania, as amended from time to time by the state court, except as otherwise provided by specific rule of this court.

^^^^^^^^^^

U.S. Dist. Ct., West. Dist., Pa.,

Local Rule 22 I C:

> For misconduct defined in these rules, any attorney admitted to practice before this court may be disbarred, suspended from practice before this court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

^^^^^^^^^^

U.S. Dist. Ct., West. Dist. Pa.,

Local Rule 22 II D:

Upon filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court shall in addition to suspending that attorney in accordance with the provisions of this rule, also refer the

matter to counsel for the institution of a disciplinary proceeding in which the sole issue shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that a disciplinary proceeding so instituted shall not be brought to final hearing until all appeals from the conviction are concluded.

^^^^^^^^^^

Pa. Supreme Ct., Code of Professional Responsibility, Sec. DR 1-102. Misconduct.:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

H. STATEMENT OF THE CASE.

Mr. Brocki bought several sexually explicit magazines in a public bookstore while on a business trip to Holland in early 1987. He mailed them to his home in Erie, Pennsylvania. After customs mail interception, search of his home under a warrant, indictment, guilty plea to 18 U.S.C. Sec. 1462 (importation of nonmailable matter) and sentence the District Court after hearing imposed suspension from law practice before it for at least six months. [Appendix(A)] The Third Circuit affirmed in a Judgment Order without opinion. [Appendix(C)]

The only judicial opinion is the Report and Recommendation ("DC Report") of the District Court hearing panel incorporated into the District Court Order. [Appendix(B)]

The DC Report cites 3 Pennsylvania Supreme Court cases and 1 hoary U.S. Supreme Court case.

The DC Report recommends suspension of Mr. Brocki on the ground that he is temporarily "unfit" to practice law under DR 1-102(A)(6) of the Code of Professional Responsibility [set out in G above]. This is a mouthful, but the DC Report says that the "unfitness" is Mr. Brocki's status of not being disciplined when the non-disciplined status causes the public to lose confidence in the bench and bar.

As opposed to the situation in ALL the Pennsylvania cases, the District Court could not or did not establish an independent satisfactory ground (such as dishonesty or moral turpitude) to underpin the catchall of "unfitness".

The DC Report states part of the case in more detail but gives little if any attention to a few key facts that stand out in the record below like El Capitan.

Mr. Brocki's clear, unimpeached and uncontradicted testimony [Appendix below, p. 72A] was that he did not know that his purchase and mailing of the magazines was immoral or illegal:

> "...when I mailed the magazines I bought in the bookstore adjacent to my hotel in Amsterdam, I didn't know it was wrong or illegal. I wouldn't have done it if I thought it was. As it turns out, I have a pretty broad view of the First Amendment, and Alan Gershwitz [Dershowitz] and I would get along very well. Other people have a different view of the First Amendment. I didn't think it was wrong. I thought a person could buy magazines in a public bookstore without violating the law of the United States, and I was wrong, and I apologize for that.

Mr. Brocki is a bona fide intellectual and scholar of encyclopedic proportions, for whom erotica is but one of scores of subjects that he has persistently studied over the years.

There is not the slightest hint in the record that Mr. Brocki is a sexual psychopath, peeping tom, swapper, trader, or involved in any way in the production, sale or distribution of erotica or the aiding or abetting of such activities any more so than his reading of murder mysteries might rationally classify him as prone to commit murder.

Mr. Brocki has NO prior involvement with the law AT ALL over pornography or sex.

At a hearing in January, 1989, (after the District Court hearing and Order) before the Disciplinary Board of the Supreme Court of Pennsylvania, the

prosecutor for the Board made no allegations of moral turpitude or other ethical failings of Mr. Brocki.

The record below fails overwhelmingly to establish that Mr. Brocki is "unfit" to practice law in any sense of ordinary language or meaning (incapable, immoral, influenced by substance abuse, dangerous to anyone, or likely to commit anything illegal with knowledge in the future). The "unfitness" found by the District Court is a tortured conclusion that, it will now be argued, violated Mr. Brocki's Constitutional rights to be free from deprivation of his livlihood on a supervague, ad hoc, essentially lawless ground that did not forewarn him of its menace nor is cured by the specific facts of the case.

I. ARGUMENT.

This Argument divides into four parts, (1) through (4):

(1) WHY CERTIORARI SHOULD BE GRANTED: SUMMARY.

Mr. Brocki believes that certiorari should be granted because (a) the lower courts have decided the important question of grounds to discipline attorneys in the federal courts in conflict with the applicable decisions of the U.S. Supreme Court; (b) the lower courts have interpreted the applicable Code of Professional Responsibility in serious conflict with the Pa. Supreme Court; (c) the lower courts' orders and opinion are in serious conflict with the applicable U.S. Supreme Court decisions regarding Constitutionally impermissible

vagueness in federal rules or regulations.

(2) CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS CONFLICTS WITH THE U.S.SUPREME COURT OVER GROUNDS FOR ATTORNEY DISCIPLINE.

The DC Report cites only one U.S. Supreme Court case, Ex Parte Wall, 107 U.S. 265 (1882). However, the DC Report neglects to note that Wall was an attorney-ringleader of a mob which forcibly abducted a man from a jail near the federal courthouse in Tampa, Florida, and hanged him. This example of disrespect for law is hardly apt for Mr. Brocki.

The District Court's Brief before the Court of Appeals ("DC Brief") cites Ex Parte Burr, 22 U.S. 529 (1824) for additional memorable language, but the

facts of the case are not reported so there is no holding.

The two present-era U.S. Supreme Court cases dealing with attorney discipline cited in the DC Brief are In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968) and In Re Snyder, 472 U.S. 634, 105 S.Ct. 2874 (1985).

These cases are in point to Mr. Brocki' situation (or are at least very close). The lower courts' conflicting opinion and orders, it is respectfully urged, compel issuance of the Writ of Certiorari.

In Ruffalo the 6th Circuit had disbarred an Ohio attorney for violating the standard of "conduct unbecoming a member of the bar" when the attorney allegedly hired an employee to investigate the employer railroad company during an FELA case preparation. The

Concurring opinion of Justices White and Marshall is in part:

> Even when a disbarment standard is as unspecific as the one before us, members of the bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as malum in se. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession.
>
> ***
>
> The appraisal of petitioner's conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question. I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct. I express no opinion about whether the Court of Appeals, as part of a Code of specific rules for the members of its bar, could proscribe the conduct for which petitioner was disbarred. Ibid., pp. 1228-1229.

Mr. Brocki argues that the purchase in public bookstores and mailing to oneself of published magazines OF ANY SEXUAL CHARACTER for totally private use with no connection to their production or distribution, given the extensive public sale of such materials in the United States for at least the last few decades, falls within this Ruffalo holding of conduct about which reasonable attorneys can differ on the morality and legality. Therefore, by itself the purchase and mailing of the magazines should not result in bar discipline.

Perhaps the District Court could have provided explicitly in its rules that a mere conviction in itself without regard to the underlying conduct is "unfitness" or "misconduct" meriting bar discipline. Of course, such an action--hypothetical for this case--would raise

an additional series of questions on the propriety or legality of the hypothetical.

Turning to Snyder, it is kind of a silly case (except for Mr. Snyder, who like Mr. Brocki was suspended by the District Court for six months). Mr. Snyder wrote the District Court a mildly possibly rude letter complaining about documentation necessary to procure and the amount of fees for federal court-appointed criminal work and refused to retract or apologize upon demand of the Court. Mr. Justice Burger writes of the possibility of filling in or avoiding the Constitutional problem posed by the standard in the Snyder case of "conduct unbecoming a member of the bar", by "case law, applicable court rules, and 'the lore of the profession', as embodied in

codes of professional conduct." Ibid., p. 2881.

By analogy, Mr. Justice Burger might use Mr. Brocki's Addendum A attached and discussed below to get out of the "unfitness" problem of this case by finding none.

In any event, this is speculation just as the quote two sentences above from Justice Burger is pure dictum. He avoids a Constitutional problem and a problem of construing "conduct unbecoming a member of the bar" by holding that the possibly rude letter does not rise or fall to the level of it, whatever it is.

(3) CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS CONFLICTS WITH THE PENNSYLVANIA SUPREME COURT OVER THE CODE OF PROFESSIONAL RESPONSIBILITY.

It seems that the Pennsylvania Supreme Court (but not the Western District or the Third Circuit) has listened to Justice Burger and has put a gloss on the Code of Professional Responsibility to preserve its Constitutionality in cases where "unfitness", CPR 1-102(A)(6), is charged in connection with the discipline of a lawyer. As summarized in Addendum A to this Petition, including the Campbell, Casety and Simon Pa. Supreme Court cases cited in the DC Report, the vague "fitness" test of CPR DR 1-102(A)(6) has never been enforced by the Pennsylvania Supreme Court independently. It is a makeweight. It has been used by the Supreme Court of Pennsylvania as an added descriptive label for the explicit violation of DR 1-102(A)(3), moral

turpitude, alone or in addition to other explicit ethical section violations.

The lower courts have departed the settled law of Pennsylvania and made new law for Mr. Brocki's case ad hoc and after the fact (which Justices White and Marshall comment on in the quote from the Ruffalo case earlier).

There are at least three results:

First, Mr. Brocki believes that he has provided another compelling ground for grant of his Petition for certiorari.

Second, it points up that Mr. Brocki has not committed any real violation of the Code of Professional Responsibility and the District Court reaches into the bleachers to pull out the concept that "unfitness" (because there is no real unfitness) is a status of being non-disciplined.

Third, this is unfair to Mr. Brocki, who viewed his purchase and mailing of the magazines as not immoral or illegal at the time and had no reason so far as he is concerned to expect bar discipline (or a criminal conviction) from his actions. The District Court Order and Report is unprincipled when it operates solely on the basis of "unfitness" without any valid underpinnings and seems to say only "We don't like Mr. Brocki's conduct, his conviction, or the criticism we might get from the public if we don't give him some kind of discipline apart from all that the criminal process has meted to him".

(4) CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURTS ARE IN SERIOUS CONFLICT WITH THE U.S. SUPREME COURT HOLDINGS ON UNCONSTITUTIONALLY VAGUE RULES.

The DC Brief cites Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547 (1974); United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1242 (1971); and Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 2547 (1974) on vagueness or overbroadness generally applied to laws or authoritative and punitive rules.

Mr. Brocki will confine his discussion to Parker v. Levy and attempt to show that the lower courts applied the sanctions of an "unfitness" local court rule in conflict with the case.

In Parker v. Levy the sections of the Uniform Code of Military Justice proscribing conduct "unbecoming an officer and gentleman" and "to the prejudice of good order and discipline of the armed forces" were upheld resulting in a three year hard-labor prison term for an army captain-medical officer who

actively counseled Negro enlisted personnel to resist or refuse combat duty in Vietnam.

Mr. Brocki reads the majority opinion in the case to be based on the following three elements: (1) military manuals and decisions of the United States Court of Military Appeals somewhat indicated the proscribed conduct; (2) Levy fairly and reasonably should have known that his conduct would be in violation of military rules; (3) there is a special urgency to the military situation and the military live in their own world that should be allowed special rules to some extent.

Mr. Brocki will assume that the potential vagueness of "unbecoming an officer and a gentleman" of the Levy situation is roughly comparable to the

potential vagueness of "unfitness" of the Brocki situation.

This is a comparison of the three elements:

(1) Levy possibly could have read military manuals and decisions of the United States Court of Military Appeals to form a reasonable opinion that his conduct was probably in violation of the military rules. On the other hand, if Mr. Brocki had read all the Pennsylvania cases dealing with disbarment or suspension he and probably many other competent lawyers would have concluded that collecting and mailing to himself sexually explicit books and magazines does not meet the moral turpitude test for bar discipline that is met in all the cases (see Addendum A). He would have found NO Pennsylvania cases dealing with suspension for violation of an obscenity

law as the purchaser and mailer of publicly sold materials.

(2) The majority thinks that Levy should have known that his conduct was wrong. (Justices Burger and Blackmun in a concurring opinion discuss the malum in se-malum prohibitum dichotomy also employed by Mr. Brocki as key part of his main Brief before the Court of Appeals.) On the other hand, Mr. Brocki has surely seen ALL the kinds of materials he was convicted of importing, in large quantities for public sale in many cities of the United States and world. This may not excuse the crime of importing obscene matter, but it certainly undercuts any credible charge that Mr. Brocki should have known that doing what was apparently moral and legal was not so.

(3) The majority, in Mr. Brocki's opinion, allow the suspect provisions of

the military code to stand because they are perceived as useful or perhaps even necessary to running a 200 year old institution and in which, as Justices Burger and Blackmun in essence observe, honor stands taller than mere morality. One the other hand, the discipline of Mr. Brocki without such at least arguably compelling reasons is to accept a tortured use of language and meaning (Mr. Brocki is "unfit" temporarily to practice law) that is not useful or necessary to protect the public, bar or bench from anything.

Additionally in discussing Parker v. Levy, more precision is required of "unfitness" in deciding its constitutionality as vague or overbroad because it touches upon Mr. Brocki's First Amendment freedoms.

Justices Stewart, Douglas and Brennan state the principle as follows in their dissent:

> This Court has repeatedly recognized that the dangers inherent in vague statutes are magnified where laws touch upon First Amendment freedoms....In such areas, more precise statutory specificity is required, lest cautious citizens steer clear of protected conduct in order to be certain of not violating the law....Parker v. Levy, op. cit.,; 94 S.Ct. 2571, 417 U.S. 776; footnote 5.

The fact that this principle occurs in a dissent does not diminish it because Justice Rehnquist writing the majority opinion gives it full recognition but states that it should not apply in a military case.

However, the Western District of Pennsylvania is not the military, so the principle should fully apply to its disciplinary rules. In particular, Mr. Brocki argues that his purchase and

mailing of magazines even if obscene or child pornography are covered because the "unfitness" test was applied by the District Court not only to his conviction by itself (in Mr. Brocki's case only for 18 U.S.C. Sec. 1462, importing or mailing obscene matter) but to the entire purchase and mailing activity. Another way of putting part of this is that if the child pornography aspect of the case or of his erotica collection is given weight in judging his "fitness", then Mr. Brocki should have the benefit of the "precise statutory specificity" requirement in judging the Constitutionality of the "fitness" test.

Mr. Brocki continues to see his involvement with the law over his Amsterdam, Holland, purchase and mailing of the magazines mainly as a First Amendment rather than a criminal matter.

NOTE: The child pornography aspect of Mr. Brocki's case has been vastly overplayed and somewhat sensationalized. Mr. Brocki's collection of several thousand publicly acquired, legally acquired published books, magazines and films was begun in college with Lady Chatterly's Lover, Peyton Place and Playboy. Over the years it has grown like the Smithsonian and contains something of everything. However, over 95% of the sexual orientation happens to be adult, garden variety. The 5% extremes seem to be expressed with a tone of everemphasis in the District Court Report.

J. CONCLUSION AND REQUEST.

WHEREFORE, based on the foregoing Petition Daniel Brocki respectfully asks this Honorable Court to issue the Writ of Certiorari.

Respectfully submitted,

/S/_____
Daniel Brocki, Esq.

For Himself

Daniel Brocki
3500 Culpepper Drive
Erie PA 16506
(814) 833-4381

ADDENDUM A

ALL PENNSYLVANIA SUPREME COURT CASES ON DISBARMENT OR SUSPENSION CITED IN DC BRIEF

CASE	UNFITNESS DR 1-102 (A)(6)	OTHER VIOLS (DR 1-102)(A)
	***	
Campbell 463 Pa. 472 (1975) NOTE: Took money on false pretenses to fix client criminal case.	YES	YES:3,4,5
	***	
Casety 511 Pa. 177 (1986) NOTE: Homicidal conduct, alchohol and drug abuse, failure to notify Disc.Bd. of prior conviction.	YES	YES:3
	***	
Grigsby 493 Pa. 194 (1981) NOTE: Filed falsely sworn documents.	NOT CITED	YES:3,4

Keller 509 Pa. 573 (1986)	NOT CITED	YES:3,4

NOTE: Forgery, theft, misrepresentation.

***

Leopold 469 Pa. 384 (1976)	YES	YES:3,4

NOTE: Theft of $5,000 from client.

***

Lewis 493 Pa. 519 (1981)	YES	YES:3,4

NOTE: Theft from client; misrepresentation.

***

Lucarini 504 Pa. 271 (1983)	YES	YES:4

NOTE: Repeated conversion of client funds.

***

Oxman 496 Pa. 534 (1981)	YES	YES:3,4

NOTE: Falsifying agreements; counseling clients to file false claims.

Simon YES YES:3
510 Pa. 312
(1986)
NOTE: Cocaine sales middleman.

***

Stern YES YES:3
515 Pa. 68
(1987)
NOTE: Union official bribe middleman.

APPENDIX(A)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIST. OF PENNSYLVANIA

IN RE: DISCIPLINE OF DANIEL LEO BROCKI, AS A MEMBER OF THE BAR OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA	)))))	MISC. NO. 15089

ORDER

AND NOW, to-wit, this 25th day of November, 1988, upon consideration of the Report and Recommendation filed by the committee appointed by the Chief Judge of the United States District Court for the Western District of Pennsylvania for the purpose of conducting such investigation and hearings as were necessary for the formulation of a recommendation on the final discipline to be imposed upon DANIEL LEO BROCKI,

IT IS ORDERED that the Report and Recommendation of the committee be and the same is hereby approved and adopted, and DANIEL LEO BROCKI is hereby suspended from the practice of law before the United States District Court for the Western District of Pennsylvania for a period of six months (6) commencing December 1, 1988, and pending further order of this Court.

The Clerk is directed to give notice of this order to all parties in interest.

/SS/ JJ.

APPENDIX(B)

IN THE U.S. DISTRICT COURT
FOR THE WESTERN DIST. OF PA.

U.S.A.	)	
	)	CRIM. NO. 88-1
V.	)	ERIE
	)	MISC. NO.
DANIEL LEO BROCKI	)	15089

REPORT AND RECOMMENDATION

I. Background

Respondent, Daniel Leo Brocki, is an attorney admitted to practice law before this Court. Mr. Brocki graduated from Harvard Law School in 1966. From 1971, until June 28, 1988, Mr. Brocki practiced law in the general counsel's office of Hammermill Paper Company in Erie, Pennsylvania.

During a week long business trip in Amsterdam, respondent purchased 36 pornographic magazines and mailed them to his home address in Erie, Pennsylvania. Fifteen of these magazines contained visual depictions of minors engaged in sexually explicit conduct. Respondent avers that he purchased these magazines in order to supplement an extensive private collection of sexually explicit materials that he had maintained since college which included homosexual pornography, bestiality, coprophilia and child pornography.

In Philadelphia, United States customs officials intercepted the mailings and reviewed the contents. After sealing the packages and mailing them to the Brocki residence, the officials obtained a search warrant for

the residence and confiscated the materials.

On January 13, 1988, Mr. Brocki was indicted by a federal grand jury for the importation or transportation of obscene matters in interstate or foreign commerce in violation of 18 U.S.C. 1462. Section 1462 is a felony, and the maximum punishment is a $5000 fine and 5 years imprisonment. In addition, the grand jury charged Brocki with receiving visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. 2252(a)(2). Section 2252(a)(2) is also a felony and carries a maximum sentence of 10 years imprisonment and a $10,000 fine.

Mr. Brocki pleaded guilty to importing or transporting obscene matters in interstate commerce on June 27, 1988. In exchange for his plea, the government

dismissed Count 2 of the indictment. On August 11, 1988, Judge Mencer sentenced Mr. Brocki to 8 months' imprisonment on condition that if he was confined to a jail type institution for two months, the remainder of his sentence would be suspended. Mr. Brocki was also placed on probation for a period of three years, ordered to pay a $5000 fine and a special assessment of $50. On September 2, 1988, respondent reported to the federal correctional institution at Danbury, Connecticut, where he served his two month imprisonment term.

Upon notification of Brocki's guilty plea, Chief Judge Cohill, pursuant to Local Rule 22 II A, on August 12, 1988, suspended Brocki from the practice of law as a member of the bar of this court. However, a majority of the judges of this district determined that good cause had

been shown in respondent's motion to stay the suspension, and on August 16, 1988, Judge Cohill set aside the suspension order. Judge Cohill appointed the undersigned as a committee to conduct a hearing and make a recommendation to the Board of Judges. On August 17, 1988, in accordance with Rule 22 II D, Thomas Hollander, Esquire, President of the Allegheny County Bar Association, was appointed counsel to institute disciplinary proceedings against Mr. Brocki. On November 3, 1988, the disciplinary hearing was held before the undersigned.

II. DISCUSSION

Rule 22 II D of the Rules of the United States District Court for the Western District of Pennsylvania provides:

> Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court, shall in addition to suspending that attorney in accordance with the provisions of this rule, also refer the matter to counsel for the institution of a disciplinary proceeding in which the sole issue to be determined shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction...
> (emphasis added)

Accordingly, if an attorney admitted to practice before this court commits a serious crime, a literal reading of the rule would indicate that the court must discipline the attorney; the only issue to be decided at the disciplinary hearing would therefore be the extent of final discipline. Rule 22 II B defines a "serious crime" as any felony. Our task is to determine the extent of final discipline to be imposed on Mr. Brocki as a result of his misconduct.

While the language of Rule 22 quoted above appears to be mandatory, we would think that it would not be unreasonable to assume that the Board of Judges could choose to take no disciplinary action if it were so inclined. In any event, the Committee believes that the offense committed by the respondent in this case cannot be ignored.

Under Rule 22 I B of the Rules of the United States District Court for the Western District of Pennsylvania, practice before this court is governed by the "Rules of Professional Conduct" ("rules") adopted by the Supreme Court of Pennsylvania on October 16, 1987, effective April 1, 1988. However, the Supreme Court of Pennsylvania has ordered that, "the Rules of Professional Conduct ... do not apply to professional misconduct occurring on or before March

31, 1988. Such misconduct shall be governed by the present Code of Professional Responsibility... ." 59 B.A.Q. 3(Jan. 1988). Thus, because Mr. Brocki's professional misconduct occurred on April 21, 1987, we must apply the Code of Professional Responsibility ("code"). We note, however, that we would achieve the same result under the new Rules.

DR 1-106(A)(6) of the Code provides that it is professional misconduct for a lawyer to engage in any activity that adversely reflects on his fitness to practice law. Similarly, under rule 8.4(b) of the Rules, "it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Respondent contends that his misconduct did not adversely affect his